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Nos. 95-345 & 95-346 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, Petitioner,

v.

GUY JEROME URSERY, Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA, Petitioner,

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL., Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* COOK COUNTY STATE'S ATTORNEY'S OFFICE JOINED BY THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC. IN SUPPORT OF THE PETITIONER

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BRIEF OF *AMICI CURIAE* COOK COUNTY STATE'S ATTORNEY'S OFFICE JOINED BY THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC. IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICI CURIAE*

The Cook County State's Attorney's Office is an entity responsible for a vast amount of criminal prosecutions and civil forfeiture actions in the State of Illinois. In 1994 alone, the Cook County State's Attorney's Office instituted approximately 28,000 felony narcotics prosecutions, as well as more than 5,600 drug-related forfeitures. The State of Illinois has enacted forfeiture statutes which are

virtually identical to the statutes at issue in the instant appeal. With this cause, this Court is asked to decide whether double jeopardy principles prohibit successive criminal prosecutions and civil forfeiture actions. In *In re P.S., a minor*, No. 78910 (Ill. January 18, 1996) (1996 Ill. LEXIS 12), the Illinois Supreme Court recently considered this question and held that double jeopardy principles are not implicated when the state prosecutes a defendant after obtaining forfeiture of the proceeds of illegal activity in a separate proceeding. Thus, the Cook County State's Attorney's Office has a compelling interest in the outcome of this appeal due to the tremendous impact it will have upon criminal prosecutions in Cook County, Illinois.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all our citizens. NDAA has a compelling interest in the outcome of this appeal due to the tremendous impact it will have upon criminal prosecutions across the country.

In accordance with Supreme Court Rule 37.2, this Brief of *Amici Curiae* is being filed with written consent of all parties to this case.

SUMMARY OF ARGUMENT

In the *Ursery* case, the United States Court of Appeals for the Sixth Circuit held that the double jeopardy provision of the Fifth Amendment prohibited prosecution of the defendant because he had already been punished in a civil forfeiture action brought under 21 U.S.C. §881(a)(7).

In the *$405,089.23* case, the United States Court of Appeals for the Ninth Circuit held that the double jeopardy provision of the Fifth Amendment barred a civil forfeiture action for the proceeds of illegal drug sales where the owners of the subject property had already been prosecuted for criminal violations arising from the same facts. The Courts of Appeals in both of these cases erred in holding that a civil forfeiture action imposes punishment for double jeopardy purposes.

A. Multiple punishments only violate the double jeopardy provision of the Fifth Amendment when they are imposed for the same offense. Because the actions in these cases are not prosecutions for the same offense, the double jeopardy bar does not apply here.

In the cases at bar, while the civil and criminal actions may have arisen out of the same conduct of the defendants, they are not necessarily prosecutions for the same offense. In *United States v. Dixon*, 509 U.S. ____, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), this Court abandoned the "same conduct" test of *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), and returned to the test originally set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under the *Blockburger* "same elements" test, two offenses are not the same for double jeopardy purposes as long as each offense contains at least one element that the other does not. In each of the cases at bar, the criminal offense and the related forfeiture action each require proof of an element that the other does not. For this reason, the lower courts erred in applying double jeopardy principles.

B. In the *$405,089.23* case, the Ninth Circuit erred in holding that forfeitures of the proceeds of criminal activity constitute punishment for double jeopardy purposes. This

Court held in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984), that the forfeiture of contraband is remedial, and not punitive, because it removes dangerous or illegal items from society. Because the claimants in the *$405,089.23* case had no right to acquire the proceeds of their illegal activities, they were not punished by their forfeiture. The Ninth Circuit therefore erred in applying double jeopardy principles.

C. In the *Ursery* case, the Sixth Circuit erred in holding that forfeiture of property which facilitates a criminal offense always imposes punishment. In fact, many such forfeitures are remedial, rather than punitive, because they remove the instrument through which the claimants commit their crimes, making it impossible for the claimants to commit further crimes. Additionally, these forfeitures provide the type of "reasonable liquidated damages" authorized by this Court in *United States v. Halper*, 490 U.S. 435, 446, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), as they attempt to reimburse the government for the costs to it and society from the claimants' illegal activities.

D. Public policy concerns require reversal of the decisions of the Courts of Appeals. If jeopardy attaches in civil forfeiture proceedings, the government will be denied the opportunity to seek imprisonment of an offender, even though imprisonment was not even an available penalty in the civil forfeiture proceeding. Conversely, where the government instead pursues a criminal action, convicted drug dealers will be allowed to reap the financial rewards of their illegal activities. Finally, the decisions here will have a tremendous adverse impact in state courts where combining civil forfeitures with criminal prosecutions is not an option.

This Court should resolve the split of authority in the Courts of Appeals by clearly defining the circumstances under which a civil forfeiture action will implicate double jeopardy concerns. In making this determination, this Court should consider that in many instances a forfeiture will constitute a different offense from the related criminal prosecution, and that even a forfeiture that does not constitute a different offense may be remedial rather than punitive. Thus, many civil forfeiture actions will not violate the double jeopardy clause's prohibition of multiple punishments for the same offense.

ARGUMENT

THE COURTS OF APPEALS ERRED IN HOLDING THAT THE DOUBLE JEOPARDY CLAUSE BARS THE GOVERNMENT FROM PURSUING BOTH A CRIMINAL PROSECUTION AND A CIVIL FORFEITURE ACTION.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. That clause protects against three distinct abuses: 1) a second prosecution after acquittal for the same offense; 2) a second prosecution after conviction for the same offense; and 3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656, 664-65 (1969). It is the third of these protections—the prohibition of multiple punishments for the same offense—that is at issue here. In the present cases, the United States Courts of Appeals for the Sixth and Ninth Circuits held that a claimant in a successful forfeiture action may not also be criminally prosecuted based on the same set of facts supporting the forfeiture. The decisions of the Courts of Appeals are mani-

festly erroneous and must be reversed for several reasons. First, the Ninth Circuit blindly applied double jeopardy principles without determining whether the civil and criminal actions involved the "same offense" under the *Blockburger/Dixon* test, while the Sixth Circuit erroneously concluded that the criminal offense was a lesser included offense of the forfeiture. Second, the Ninth Circuit erred in holding that forfeitures of the proceeds of illegal activity pursuant to 21 U.S.C. §881(a)(6) constitute punishment for double jeopardy analysis. Third, the Sixth Circuit failed to acknowledge that forfeitures of property which facilitates a criminal offense pursuant to 21 U.S.C. §881(a)(7) may be remedial rather than punitive for purposes of double jeopardy analysis. Finally, the decisions of the Courts of Appeals conflict with sound public policy.

A. Double Jeopardy concerns are not triggered by a civil forfeiture action and a criminal prosecution, because they do not impose punishment for the "same offense."

In the cases at bar, the Courts of Appeals concluded that the civil forfeitures amounted to punishment, and therefore the government's actions in obtaining civil forfeitures and criminal convictions in separate proceedings violated the Double Jeopardy Clause. In so holding, the Courts of Appeals overlooked a crucial fact: double jeopardy principles do not prohibit the imposition of all multiple punishments, but only those punishments imposed *for the same offense*. U.S. Const. amend. V; *see also United States v. Halper*, 490 U.S. 435, 440, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989); *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945, 218 L. Ed. 2d 767 (1994). The case of *United States v. Dixon*, 509 U.S. ____, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993) contains the last definitive statement from this Court concerning whether two actions involve the same

offense for double jeopardy purposes. In *Dixon*, this Court held that it is not necessary for the government to show that successive prosecutions were based on different *conduct* in order to avoid double jeopardy. In so doing, this Court overruled the "same conduct" test of *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), and returned to the "same elements" test of *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

Under the "same elements" test, now known as the *Blockburger/Dixon* test, two actions will constitute separate offenses for double jeopardy purposes if each requires proof of an element that the other does not. When applying the *Blockburger/Dixon* test, courts must focus upon "*the statutory elements of each offense, rather than on the actual evidence presented at trial.*" *Illinois v. Vitale*, 447 U.S. 410, 416, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980) (emphasis added).

A criminal prosecution requires proof beyond a reasonable doubt of an element not found in a forfeiture case: that the defendant possessed the requisite mental state and performed the proscribed act. To prevail in a forfeiture action, however, the government need only show probable cause to believe that someone has used or obtained the property through prohibited actions. Once the government has met this burden, the burden then shifts to the property owner to establish lack of knowledge or consent. This is an affirmative defense and not one of the elements in the government's forfeiture case. *United States v. Thibault*, 897 F. Supp. 495, 498 (D. Colo. 1995). "Probable cause does not require a showing of any specific claimant's mens rea. It must only be shown that the property has a substantial nexus with drug related activity." *United States v. Falkowski*, 900 F. Supp. 1207, 1215 n.8

(D. Alaska 1995). Indeed, a forfeiture action may succeed even without criminal prosecution of the property owner or anyone else. *See United States v. One 1987 Jeep Wrangler Automobile*, 972 F.2d 472, 476 (2d Cir. 1992). Conversely, a forfeiture case requires proof of an element not necessary to a criminal prosecution: that the subject property was involved in a crime. Thus, because a criminal prosecution and a civil forfeiture each always require proof of an element that the other does not, under the *Blockburger/Dixon* test a civil forfeiture never has the same elements as a criminal offense.

In *In re P.S., a minor*, No. 78910 (Ill. January 18, 1996) (1996 Ill. LEXIS 12), the Illinois Supreme Court applied the *Blockburger/Dixon* test and concluded that forfeiture of the proceeds of drug sales required proof of different elements from criminal charges of possession of a controlled substance, possession with intent to deliver, and possession without a tax stamp. In reaching this conclusion, the court noted that there was no factual link between the forfeitable proceeds and the criminal offense: "[t]he cash could not have been traced to the proceeds of any sale of any of the cocaine found in the indictment since defendant is charged with possession of that cocaine, which had not yet been sold." *In re P.S., a minor*, No. 78910 (Ill. January 18, 1996) (1996 Ill. LEXIS 12, *22), citing *United States v. Leaniz*, No. CR-2-90-18 (S.D. Ohio, March 31, 1995) (1995 U.S. Dist. LEXIS 4039 *15); *see also United States v. Rhodes*, 62 F.3d 1449, 1452 (D.C. Cir. 1995).

In the *$405,089.23* case, the Ninth Circuit failed to consider whether the civil forfeitures and the criminal offenses were the same under the *Blockburger/Dixon* test. In the *Ursery* case, the Sixth Circuit applied the *Blockburger/Dixon* test, but erroneously concluded that the

criminal offense was a lesser included offense of the forfeiture. However, an examination of the elements of the offenses involved here demonstrates that they are separate offenses under the *Blockburger/Dixon* test.

In the *Ursery* case, the defendant was prosecuted for manufacturing marijuana in violation of 21 U.S.C. §841(a)(1). Under that statute, the government must prove that the defendant manufactured a controlled substance, and that he did so knowingly. The defendant's residence was forfeited pursuant to 21 U.S.C. §881(a)(7), which provides for forfeiture of real property used or intended to be used to commit or facilitate commission of a felony violation of title 21 of the United States Code. Each of these statutes contains an element that the other does not. To establish the criminal violation, the government must prove that the defendant acted knowingly or intentionally. The forfeiture action, however, requires no proof of any mental state. Likewise, to obtain forfeiture of the defendant's real estate, the government must prove that the real estate was used or intended to be used to commit or facilitate the commission of a drug offense. The criminal prosecution does not require any proof that any real estate was used in the offense.

The *$405,089.23* case involved two criminal offenses. First, the defendants were prosecuted for money laundering in violation of 18 U.S.C. §1956, which requires proof that the defendants conducted or attempted to conduct a financial transaction involving the proceeds of unlawful activity, and that they did so knowingly or with the intent to promote the unlawful activity. Some of the defendants' property was forfeited under 18 U.S.C. §981(a)(1)(A), which required the government to prove that the property was involved in a violation of §5313(a) or 5324(a) of title 31, or §1956 or 1957 of title 18, or traceable to such prop-

erty. Once again, the criminal proseecution requires proof of a mental state not necessary to the forfeiture, while the forfeiture requires proof of the involvement of property not necessary to the criminal case.

The defendants in the *$405,089.23* case were also prosecuted for conspiracy to manufacture methamphetamine, in violation of 21 U.S.C. §841(a)(1). Under that statute, the government must prove that the defendants knowingly conspired to manufacture a controlled substance. The defendants' property was forfeited pursuant to 21 U.S.C. §881(a)(6), which allows forfeiture of money furnished or intended to be furnished in exchange for a controlled substance, or proceeds traceable to such an exchange. Once again, each statute contains an element that the other does not. The criminal offense requuires proof of a conspiracy to manufacture a controlled substance, but does not require proof of any sale or intended sale. The forfeiture action, on the other hand, reqquires proof of a sale or intended sale but requires no prooof of any conspiracy to manufacture. Thus, the criminal offense and the forfeiture are not the "same offense" undder the *Blockburger/ Dixon* test.

Because the criminal prosecutions and civil forfeitures in these cases are not prosecutions for the same offense, the Courts of Appeals erroneously appplied double jeopardy principles in the cases at bar. Accorddingly, *Amici Curiae* respectfully urge this Court to reveerse the decisions of the Courts of Appeals.

B. Forfeitures of the proceeds of illegal drug sales pursuant to 21 U.S.C.§881(a)(6) are remedial and do not constitute "punishment."

In *United States v. Halper*, 490 UU.S. 435 (1989), this Court analyzed the application of a $$130,000 civil fine to

a fraud on the government resulting in $585 in damages, and determined that such an "overwhelmingly disproportionate" assessment amounted to punishment within the meaning of the double jeopardy clause. Thus, this Court held that "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Halper*, 490 U.S. at 448-49. This Court noted, however, that the government may use civil sanctions to achieve "rough remedial justice," including "reasonable liquidated damages or a fixed sum plus double damages." *Halper*, 490 U.S. at 446. Accordingly, customs forfeitures following criminal convictions were held permissible as they provide "a reasonable form of liquidated damages" for the costs of investigation and enforcement of the customs laws. *Halper*, 490 U.S. at 446, citing *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 93 S. Ct. 489, 34 L. Ed. 2d 438 (1972).

Four years later, in *Austin v. United States*, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), this Court held that civil forfeitures of property used to further drug trafficking constitute "punishment" for determining the applicability of the Eighth Amendment's excessive fines clause. In making this determination, this Court observed that "[t]he Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, but only in cases where the forfeiture could properly be characterized as remedial." *Austin*, 113 S. Ct. at 2805 n.4.

In the *$405,089.23* case, the government sought forfeiture of the proceeds of illegal narcotics sales under 21 U.S.C. §881(a)(6). The Ninth Circuit relied heavily on the *Austin* case in holding that forfeitures impose punishment, but

failed to recognize that *Austin* did not determine that *all* forfeitures constitute punishment. The *Austin* decision dealt only with forfeitures of facilitating property under 21 U.S.C. §§ 881(a)(4) and (a)(7), and not with forfeitures of the proceeds of illegal drug sales under 21 U.S.C. §881(a)(6).

A claimant has no right to acquire the proceeds of illegal drug sales, and thus has no right to keep the money he acquired. "[I]f money constitutes the proceeds of a drug transaction, it is illegal to possess and thus is rightly considered contraband." *United States v. $45,140.00*, 839 F. Supp. 556, 558 (N.D. Ill. 1993). In *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984), this Court held that the forfeiture of contraband is remedial, rather than punitive, because it removes dangerous or illegal items from society. In *Austin*, this Court expressly recognized and reaffirmed this holding. *Austin*, 113 S. Ct. at 2811. This Court further noted that the Double Jeopardy Clause does not apply to civil forfeiture proceedings which are remedial in nature. *Austin*, 113 S. Ct. at 2816 n.4. Thus, this Court in *Austin* clearly recognized that the reasoning underlying its application of double jeopardy principles to property forfeitures has no application to remedial forfeitures of the proceeds of illegal drug sales.

Following this reasoning, numerous courts have reached a result contrary to the decision of the Ninth Circuit in *$405,089.23*, distinguishing the property forfeitures at issue in *Austin* from forfeitures of illegal drug proceeds. These courts have expressly held that because the forfeiture of illegal drug proceeds is remedial, it is not punishment. *See United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994); *United States v. $184,505.01 in U.S. Currency*, No. 94-3528 (3d Cir., December 29, 1995) (1995 U.S. App. LEXIS 37151); *United States v. Fields*, No. 94-10185 (5th

Cir., January 9, 1996) (1996 U.S. App. LEXIS 265); *United States v. Salinas*, 65 F.3d 551 (6th Cir. 1995); *United States v. Clementi*, 70 F.3d 997 (8th Cir. 1995); *United States v. One Parcel of Real Estate Located at Rural Route 9, LaHarpe, Illinois*, 900 F. Supp. 1032 (C.D. Ill. 1995); *United States v. One 1989, 23 Foot, Wellcraft Motor Vessel*, Civ. No. 90-1571(PG) (D. Puerto Rico, December 13, 1995) (1995 U.S. Dist. LEXIS 19687); *Clark v. United States*, No. 4:95CV129 (E.D. Va., December 19, 1995) (1995 U.S. Dist. LEXIS 19992); *United States v. $288,930.00*, 838 F. Supp. 367, 370 (N.D. Ill. 1993); *$45,140.00*, 839 F. Supp. at 558; *United States v. Moffitt*, 875 F. Supp. 1190, 1197 (E.D. Va. 1995); *Maldonado v. United States*, No. 94 Civ. 7120 (S.D.N.Y. Jan. 6, 1995) (1995 U.S. Dist. LEXIS 108, *6); and *United States v. Haywood*, 864 F. Supp. 502, 507-09 (W.D.N.C. 1994). As the *Tilley* court explained:

> The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity. . . . [T]he forfeiture of illegal proceeds, much like the confiscation of stolen money from a bank robber, merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme. This is not punishment "within the plain meaning of the word."

Tilley, 18 F.3d at 300 (quoting *Halper*, 490 U.S. at 449).

Because the forfeiture of illegal drug proceeds does not impose punishment, this type of action does not implicate the Double Jeopardy Clause. The Ninth Circuit in *$405,089.23* ignored the remedial nature of forfeitures of illegal drug proceeds, and erroneously extended the reason-

ing of *Austin*. Accordingly, the decision of the Court of Appeals for the Ninth Circuit must be reversed.

C. Forfeitures of property which facilitates a criminal offense pursuant to 21 U.S.C.§881(a)(7) are remedial and do not constitute "punishment."

As demonstrated in Point B herein, forfeitures of the proceeds of illegal activity are clearly remedial. But even a forfeiture of property which facilitates a crime can be remedial. For example, the forfeiture of a crack house to abate a public nuisance would certainly be remedial. Likewise, the forfeiture of property used to facilitate the distribution of illegal drugs is remedial. Property which a claimant may have lawfully acquired becomes contraband when the claimant chooses to use it to further his illegal activities. In *United States v. Cullen*, 979 F.2d 992 (1992), the Fourth Circuit upheld the forfeiture of a building which housed a clinic and pharmacy from which a physician distributed controlled substances outside the scope of legitimate medical practice. The Court determined that although "[a]ny sanction imposed by the government may have a retributive aspect," the forfeiture of the physician's building "plainly served a remedial purpose, by removing the instrument through which [the physician and his wife] had plied their unlawful trade." *Cullen*, 979 F.2d at 994. The court went on to note that "[t]he removal of an instrument of the offense is not primarily an act of punishment; rather, forfeiture protects the community from the threat of continued drug dealing." *Cullen*, 979 F.2d at 994. Ultimately, the court held that "the Double Jeopardy Clause does not apply to civil forfeitures where the property itself has been an instrument of criminal activity." *Cullen*, 979 F.2d at 995. *Accord*, *United States v. Erinkitola*, 901 F. Supp. 80 (N.D.N.Y. 1995) (forfeiture of car driven to scene of drug offense

is remedial because it removes instrumentality of the crime from circulation); *Pennsylvania v. Wingait Farms*, 659 A.2d 584 (Pa. Commw. Ct. 1995) (forfeiture of horse farm remedial and not punitive, relying on *One Assortment of 89 Firearms*, 465 U.S. 354 (1984)). Similarly, in the *$405,089.23* case, Payback Mines was a front corporation through which the claimants laundered illegal drug proceeds. Thus, forfeiture of the assets of that corporation was remedial, as it simply deprived the offenders of the instrument of their crimes.

The majority of this Court in *Austin* expressly left open the possibility that some forfeitures of facilitating property may serve a remedial purpose:

> [I]t appears to make little practical difference whether the Excessive Fines Clause applies to *all* forfeitures under §§ 881(a)(4) and (a)(7) or *only to those that cannot be characterized as purely remedial*. The Clause prohibits only the imposition of "excessive" fines, and a fine that serves purely remedial purposes cannot be considered "excessive" in any event.

Austin, 113 S. Ct. at 2812 n.14 (emphasis added). Moreover, the *Halper* Court expressly noted that the government is entitled to "rough justice." As the Fifth Circuit observed in *Tilley*, the costs to the government and society from illegal drug offenses runs from $60 to $120 billion per year. *See Tilley*, 18 F.3d at 299. While it may be inequitable to "plac[e] full responsibility for the 'war on drugs' on the shoulders of every individual claimant,"[1] such national costs may be used to exhibit a "rough proportionality" between the sanction and the resulting governmental and societal costs in a particular case. *Tilley*,

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[1] *United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive*, 954 F.2d 29, 37 (2d Cir. 1992).

18 F.3d at 299. *See also Kurth*, 114 S. Ct. at 1954 (O'Connor, J., dissenting) ("[M]easuring the costs actually imposed by every participant in the illegal drug trade would be, to the extent that it is even possible, so complex as to make the game not worth the candle. Thus, the government must resort to approximation—in effect, it exacts liquidated damages." (Citation omitted)). Accordingly, in *United States v. Buchanan*, 70 F.3d 818, 830 n.12 (5th Cir. 1995), the Fifth Circuit held that forfeiture of facilitating property is not punitive if "rationally related to the governmental and societal losses associated with [defendant's] crack cocaine operation."

In *United States v. A Parcel of Land With A Building Located at 40 Moon Hill Road, Northbridge, Massachusetts*, 884 F.2d 41 (1st Cir. 1989), the First Circuit upheld the forfeiture of a 17.9 acre tract of land, including a home and other buildings, where the land was used to cultivate marijuana with the intent to distribute it. The court stated:

> Even for an infraction of the narcotics laws far smaller in magnitude than that of appellants, forfeiture of the entire tract of land upon which the drugs were produced or possessed with intent to distribute is justifiable as a means of remedying the government's injury and loss. The ravages of drugs upon our nation and the billions the government is being forced to spend upon investigation and enforcement—not to mention the costs of drug-related crime and drug abuse treatment, rehabilitation, and prevention—easily justify a recovery in excess of the strict value of the property actually devoted to growing the illegal substance. . . .

40 Moon Hill Road, 884 F.2d at 43.

Because the Courts of Appeals in these cases failed to acknowledge the remedial nature of the forfeitures at

issue here, their decisions are erroneous. Therefore, *Amici Curiae* respectfully urge this Court to reverse the decisions of the Courts of Appeals in these cases.

D. The decisions of the Courts of Appeals contravene sound public policy.

The legislature clearly intended forfeiture proceedings to supplement, rather than supplant, criminal trials. In *United States v. Furlett*, 781 F. Supp. 536 (N.D. Ill. 1991), the court explained the injustice that results from invalidating criminal penalties based upon prior civil sanctions. *Furlett*, 781 F. Supp. at 541. The court noted that the limited range of remedies available in civil proceedings does not include incarceration. Thus, if jeopardy attaches to penalties imposed in a prior civil proceeding, the government would be denied the opportunity to seek imprisonment, despite the fact that imprisonment was not even an available penalty in the civil proceeding. *Furlett*, 781 F. Supp. at 541. These same concerns apply with equal force to drug forfeitures.

Likewise, barring the government from removing the proceeds of illegal drug sales from the hands of convicted drug dealers contravenes sound public policy. A convicted criminal should not be unjustly enriched by being permitted to retain his ill-gotten gains. *See United States v. Borromeo*, 1 F.3d 219 (4th Cir. 1993) ("It is arguable that there is little justification for the position that one who successfully parlays his tainted dollar into a fortune should be permitted to enjoy a windfall. . . .") Yet that is precisely the result that will follow from the decisions of the Courts of Appeals in these cases.

Furthermore, affirmance of the decisions of the Courts of Appeals in these cases would wreak havoc on state prosecutions across the nation. For example, although the

federal government may choose to bring criminal forfeiture actions, rather than civil forfeiture actions, *see* 21 U.S.C. § 853, no such alternative exists in Illinois. Therefore, combining forfeiture proceedings with criminal prosecutions would not solve the dilemma created by the decisions of the Courts of Appeals. Combining the two proceedings would create countless problems, and drafting adequate jury instructions for a combined proceeding would be most difficult. To illustrate, in a criminal prosecution, the State must prove the elements of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 368 (1970). In a civil forfeiture action pursuant to the Illinois Drug Asset Forfeiture Procedure Act, however, once the State shows probable cause for the forfeiture of the property, the burden shifts to the claimant to establish by a preponderance of the evidence that his interest in the property is not subject to forfeiture. 725 ILCS 150/9(G) (1992). Thus, even if the State is unable to prove the criminal charge beyond a reasonable doubt, the claimant still may be unable to meet his burden to show that the property is not subject to forfeiture. If the proceedings were combined, however, the State's burden of proof on the forfeiture would effectively be raised to beyond a reasonable doubt. This result is directly contrary to the legislature's clearly expressed intent.

Other important differences between the two proceedings militate against combining them. Because a forfeiture action is civil in nature, the State is permitted to conduct discovery and take depositions, *see* Ill. S.Ct. R. 201 & 202, and the State may call the claimant as its own witness. Similarly, a claimant is not entitled to counsel in a civil forfeiture action. *See Scott v. Illinois*, 440 U.S. 367, 369-74, 99 S. Ct. 1158, 1159-62, 59 L. Ed. 2d 383, 386-89 (1979) (constitutional right to appointment of coun-

sel is generally limited to criminal proceedings which result in actual imprisonment); *see also United States v. $292,888.04 in U.S. Currency*, 54 F.3d 564 (9th Cir. 1995) (civil forfeiture is not a prosecution for purposes of Sixth Amendment right to counsel). Additionally, Illinois' Drug Asset Forfeiture Procedure Act specifically directs that the trial judge consider hearsay evidence in determining whether the State has established probable cause that the asset is subject to forfeiture, and further provides that the laws of evidence applicable to civil actions shall apply. 725 ILCS 150/9(B) (1992). Because of these crucial differences between civil forfeitures and criminal prosecutions, the proceedings necessarily must be conducted separately in accordance with the legislature's clearly expressed intent.

For all of these reasons, this Court should reverse the decisions of the Courts of Appeals and hold that the civil forfeitures in these cases do not implicate the double jeopardy clause.

CONCLUSION

The Cook County State's Attorney's Office and the National District Attorneys Association, as *Amici Curiae*, respectfully request that this Honorable Court reverse the judgments of the United States Courts of Appeals for the Sixth and Ninth Circuits and hold that the forfeitures in these cases do not implicate the Double Jeopardy Clause.

Respectfully submitted,

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